



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Inter-Continental Equipment, Inc.

File: B-224433

Date: September 24, 1986

DIGEST

1. A protest not filed within 10 working days after the protester is advised its agency protest is denied is untimely and will not be considered on the merits.
2. Protest which is not filed within 10 working days after protester knew its basis for protest is untimely. Allegation questioning the propriety of an amendment to a solicitation must be filed before the date proposals in response to the amendment are due.

DECISION

Inter-Continental Equipment, Inc. (ICE) protests the award of a contract to Interpool, Ltd. under request for proposals (RFP) No. F61546-85-R-0671 issued by the United States Air Force Contracting Center, Lindsey Air Station, Germany. The RFP was issued to obtain a number of munition storage and transportation containers for use in Europe. ICE contends that the award to Interpool violates the Trade Agreements Act of 1979 and the Cargo Preference Act. In addition, ICE questions the propriety of several other actions taken by the Air Force during the course of the procurement.

We dismiss the protest.

The RFP was issued on December 12, 1985 and advised offerors that award would be made to the lowest priced technically acceptable offeror. Two amendments were issued by the Air Force prior to the February 20 closing date and 9 proposals were received by that date. The technical evaluation panel found that no proposal was totally acceptable and as a result, discussions were held with all nine offerors to clarify the proposals and point out deficiencies. The most significant problem area concerned the design drawings required to be furnished and on March 21, amendment No. 0003 to the RFP was issued by the Air Force which permitted the submission of

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drawings stamped "subject to satisfactory prototype testing." The amendment also established April 1, 1986 as the due date for the submission of best and final offers (BAFOs).

All nine offerors submitted BAFOs by the specified due date. Subsequently, the Air Force's requirements changed and amendment No. 0004 was issued which reduced the quantity of containers to be procured, added a Warranty of Supplies Clause and established a requirement for first article approval. The closing date for the second round of BAFOs was set for May 30. On May 20, amendment No. 0005 was issued which included additional technical requirements, but made no change to the specified closing date. Eight BAFOs were received by the May 30 closing date and Interpool was evaluated as the low, technically acceptable offeror, while ICE was found to be fifth in line for award. The Air Force awarded the contract to Interpool, Ltd. on June 4 and all offerors were notified of this action by letter dated June 6.

On June 23, ICE filed a protest of the award with the contracting officer. ICE alleged that the award to Interpool violated the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1982), which prohibits the purchase of foreign end products exceeding an established dollar threshold unless those products originate in a designated country, because the containers offered by Interpool are produced in Poland, a nondesignated country. In addition, ICE argued that the award resulted in a de facto violation of the Cargo Preference Act of 1954, 46 U.S.C. § 1241 (1982), because Interpool was a European manufacturer, and with delivery being made to the United Kingdom, United States flag carriers could not be used to ship the products. Also, ICE complained that Interpool was not a responsible offeror, that the Air Force improperly allowed Interpool to submit information through repeated request for BAFOs, that the Air Force engaged in technical leveling and that the award to Interpool was contrary to public policy since Poland, a Warsaw Pact country, will receive a substantial portion of the contract proceeds.

By telex of July 1, ICE was advised by the contracting officer that its protest was denied. The Air Force indicated it did not consider the solicitation subject to the Trade Agreements Act and that the Cargo Preference Act did not require the use of U.S. vessels when U.S. vessels are unavailable. In addition, the Air Force stated that it found Interpool a responsible offeror, that proper procedures were followed during the course of the procurement and that no technical leveling occurred. The Air Force concluded that award to Interpool was proper and that the allegations raised by ICE were without merit.

By telex dated July 3, ICE requested the contracting officer to verify the date of approval for the design drawings submitted by each of the nine offerors. The contracting officer responded by telex of July 8 and indicated that by the May 30 closing date for receipt of BAFOs, all offerors, except one, submitted design drawings that were approved in accordance with the solicitation. By letter dated July 17, filed with our Office on July 18, ICE protested the Air Force's award to Interpool to our Office. In addition to the protest issues raised with the Air Force, ICE also alleged that it was entitled to an award because it was the only "responsive bidder" as of the February 20 closing date for receipt of proposals and that the Air Force's issuance of amendment Nos. 0003, 0004 and 0005 was improper.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1986), provide that when a protest is initially filed with a procuring agency, any subsequent protest to our Office must be filed within 10 working days of knowledge of initial adverse agency action. Blinderman Construction Co., Inc., B-222523, June 16, 1986, 86-1 CPD ¶ 554. Here, ICE's 10 days began to run on July 1 when the Air Force notified ICE that its protest had been denied. Since ICE's protest was received in our Office on the 12th working day after it was notified that its agency level protest had been denied, its protest is untimely and will not be considered on the merits.

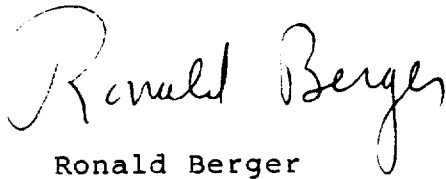
Furthermore, section 21.2(a)(3) of our Regulations is clear that it is knowledge of the initial adverse agency action on a protest at that level that triggers the 10-day period for filing a subsequent protest to our Office. Shelf Stable Foods, Inc.--Request for Reconsideration, B-222016.2, Mar. 10, 1986, 86-1 CPD ¶ 237. Consequently, ICE's contention that it sought final clarification of the denial of its protest by its July 3 telex and that the 10-day period should be measured from July 8 when it received the Air Force's response is without merit. The fact that a firm continues to pursue a denied protest with the contracting agency does not warrant our consideration of a subsequently filed protest that does not comply with section 21.2(a)(3). See Bobnreen Consultants, Inc., B-218214.3, May 31, 1985, 85-1 CPD ¶ 636.

Furthermore, the additional issues raised by ICE for the first time in its protest to our Office are also untimely. ICE's allegation that it should have been awarded the contract after the receipt of initial proposals on February 20 is based on its argument that only it had submitted a "responsive" proposal and the Air Force did not award it the contract at that time because it requested government financing. However,

ICE has submitted an affidavit in which it states that the contracting officer advised ICE on April 24 that had it not asked for government financing the contract could have been awarded to ICE based on its initial proposal. Consequently, to the extent ICE believes it should have been awarded the contract because its request for government financing was not inconsistent with the terms of the RFP, ICE was required to protest this determination within 10 working days of being notified by the Air Force's position on this issue.^{1/}
4 C.F.R. § 21.2(a)(2).

Concerning the propriety of amendment Nos. 0003, 0004 and 0005, any protest of the changes made by those amendments or the amendments themselves, are required to be filed by the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1); T.R.A.P. Equipment Corp., B-218251, May 15, 1985, 85-1 CPD ¶ 550. Accordingly, ICE's allegation that the issuance of these three amendments was improper will not be considered.

The protest is dismissed.



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General Counsel

^{1/} We point out that this was a negotiated procurement and there was no requirement that the Air Force award the contract to ICE even if ICE did submit the only proposal that complied with all the RFP requirements as of the initial closing date. In negotiated procurements, discussions are generally required with all offerors within the competitive range and the decision whether to award on the basis of initial proposals is discretionary. Kisco Co., Inc., B-216953, Mar. 22, 1985, 85-1 CPD ¶ 334. Consequently, regardless of whether ICE's initial proposal was properly found deficient, ICE has no right to an award on that basis.